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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 110

NATIONAL WOODWORK MANUFACTURERS' ASSOCIATION, ET AL., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 111

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

NATIONAL WOODWORK MANUFACTURERS' ASSOCIATION, ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Brief for the Associated General Contractors of America, The Mechanical Contractors Association of America, Inc., The Air-Conditioning and Refrigeration Institute, The National Association of Home Builders, The American Plywood Association, The National Forest Products Association, and The Chamber of Commerce of the United States, as Amici Curiae

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This brief on behalf of the Associated General Contractors of America, The Mechanical Contractors Association of America, Inc., The Air-Conditioning and Refrigeration Institute, The National Association of Home Builders, The American Plywood Association,

The National Forest Products Association, and The Chamber of Commerce of the United States, as *amici curiae*, is filed pursuant to written consent of the parties under Rule 42(2) of the Court. It is in support of the position of National Woodwork Manufacturers' Association, *et al.*, that the National Labor Relations Board (herein called the Board) in the case before it erroneously interpreted the provisions of Sections 8(b)(4)(A) and (B), and Section 8(e) of the National Labor Relations Act (herein called the Act).

I. THE INTERESTS OF THE AMICI CURIAE IN THESE CASES

Each *amicus curiae* participating in this joint brief has a substantial, though differing, interest in the subject matter of these cases. The interest of each will be set forth below.

A. The Associated General Contractors of America

The Associated General Contractors of America (herein called the AGC) is a national association representing approximately 8,088 general construction contractors throughout the country. The general construction industry as a whole employs approximately 3,500,000 workers and annually performs contracts in the amount of $96,000,000,000. Based on a gross national production of $676,300,000,000 for 1965, this represents over 14 per cent of the national production. Members of the AGC annually perform contracts in the amount of $75,000,000,000, or approximately 80 per cent of the construction in the industry. AGC members directly employ on their own payrolls approximately 1,000,000 workers.

Almost all of the contractors which are members of the AGC are affiliated with local chapters of the AGC. There are 130 such chapters, statewide or metropolitan in their jurisdiction. At least one such chapter exists in each of the 50 states. In addition to the approximately 8,088 general contractors which are members of the AGC and its local chapters, there are numerous non-general contractors—contractors in the mechanical, electrical or other specialized fields—which hold associate memberships in local chapters of the AGC but are not members of the national AGC.

The general contractor customarily is responsible for the performance of all work on construction projects. The general contractor arranges and coordinates the work among the various subcontractors so that construction proceeds upon an established schedule, and plans assignments so that each subcontractor's phase of construction is performed in proper sequence with the work of the other subcontractors and with the work performed by the general contractor through its own employees. The work of the various contractors on a construction project is interdependent to the extent that frequently work by some contractors cannot be undertaken until certain other stages of construction are in process or completed. Consequently, a work stoppage by employees of one of the subcontractors on the project, or by employees of the general contractor itself, can and often does effectively halt construction throughout an entire project.

Customarily, the general contractor on a project retains part of the construction work and subcontracts the remainder, especially those parts of the work usually performed by so-called specialty or mechanical

contractors (see *infra*, pp. 5-6). Among the work normally retained by the general contractor is the general carpentry work on a project. In the performance of this work, the general contractor normally is required to procure various materials for installation on the project—although in some cases, as in the erection of prefabricated building or housing units, the materials in major part may be furnished by the owner. In the instances where the procuring of the material is left to the general contractor, his discretion as to source may or may not be limited under the project contract. Thus, in some cases the contract may specify the installation of prefabricated material or material supplied, manufactured or assembled by a particular company or companies. In others, there may be no such specification. But in any event, the building industry is highly competitive with the project contract frequently going to the general contractor who can perform the construction at the least cost. To accomplish this, the general contractor frequently bids on a job on the well-understood assumption that he will be permitted to take advantage of the technological development of prefabricated, or factory made, materials—which today almost entirely are produced by unionized plants. The prefabricated materials installed by the general contractor's employees range from the completely prefabricated unit to the component parts of the structure such as doors (as here), trusses or roof supports, wall panels, floor units, trim, window units, preglazed glass units, etc.

In addition, the general contractor's bid on a project normally includes the estimated costs of specialty or mechanical contractors who may, and usually do, submit sub-bids with the expectation that they will be

permitted to install, without work stoppages or additional labor costs, various prefabricated units produced by nationally recognized manufacturers—almost all of whom themselves are unionized.

The Board's decision here under review permits a union, under certain circumstances, to control the selection and purchase of materials to be installed at a construction project through contract clauses and project work stoppages, contrary to the plain Congressional language and intent of the Act. The importance of this decision to the AGC and its members is clear.

B. The Mechanical Contractors Association of America, Inc.

The interest of the Mechanical Contractors Association of America, Inc. (herein called the MCA), is similar to that of the AGC.

The MCA is a national association of contractors engaged primarily in the installation of heating, air-conditioning, plumbing, and industrial and process piping systems, with approximately 1,000 members. These contractors employ approximately 90,000 persons, and do an annual volume of business of approximately $3,500,000,000.

Approximately 75 per cent of said contractors belong to forty-five local associations, organized on metropolitan, regional or statewide lines, which are affiliated with the national MCA; the remaining 25 per cent are affiliated directly with the MCA, without membership in any intermediate association.

MCA member contractors in the performance of their contracts are required to install various types of prefabricated units—sometimes called "packaged" units—such as boilers, air-conditioning and refrigera-

tion equipment, heat exchangers, waste heat boilers, steam generators, gas analyzers, pumps with auxiliary piping, gas dryers, chlorinators, turbo generator sets, gas and air compressors, fuel oil pumping and heating units, gas purifiers, gas and oil fired heaters, coal and ash systems, demineralizers, desuperheater stations, air conveying systems, hydrogen and hydrogen chloride units, hydrogen cyanide and hydrogen sulfide assemblies, uni-pak gasoline plants, and sterilizing units.

In the installation of such prefabricated units, MCA members frequently have encountered demands from the various unions which represent their employees similar to the demands of the unions in these cases. These demands are generally that all or certain parts of the prefabricated units be dismantled and reassembled by union members on the project for the alleged reason that work of this nature in the past had been performed on the job.[1] As in the case here, these demands are enforced by threats and refusals to install the prefabricated units.

MCA's interest is plain. If, as the Board held in the instant case, unions may under certain circumstances lawfully veto the installation of prefabricated doors because they entrench on the work which previously may have been done by carpenters on the job, then obviously they can lawfully veto the installation of any other prefabricated unit because it cuts into work formerly done on the job by, for example, sheet metal workers, plumbers, pipefitters, or boilermakers.

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[1] See, *e.g.*, *American Boiler Manufacturers' Association*, 154 NLRB Nos. 11 and 12, 59 LRRM 1727, 1734, pending review in the Eighth Circuit (Nos. 18,106 and 18,107).

C. The Air-Conditioning and Refrigeration Institute

The Air-Conditioning and Refrigeration Institute (herein called the ARI) has a different interest. Its interest is that of the manufacturer of prefabricated or "packaged" products installed at construction projects.

The ARI is a national trade association consisting of approximately 160 manufacturing companies in the air-conditioning and refrigeration industry. These companies are the principal manufacturers of the end-products and components[2] in an industry with an annual dollar sales volume of $2,000,000,000. Their plants are located throughout the United States with principal concentration in the Middle West and North East. Their air-conditioning and refrigeration equipment is sold and shipped to every state and to foreign countries.

Among the end-products manufactured by ARI's members and certain others are so-called "packaged" equipment. These are products which are manufactured, assembled, and, by necessity, tested for safety and efficiency *at the factory,* and then shipped to the job site for installation in the residence, apartment house, office building, factory or commercial establishment. Most of the manufacturers of this equipment, whether or not members of ARI, participate in ARI sponsored Certification Programs, whereby said manufacturers certify that the advertised capacity rating of such equipment has been achieved on the basis of tests in accordance with specified ARI standards. The

[2] The principal components are compressors, motors, condensers, condensing units, coils, controls, valves, tubing, wiring, and refrigerant gases.

type of such packaged equipment, the manufacturers' dollar value of each and the number of manufacturers for the calendar year of 1965 are as follows:

Product	Manufacturers Value	Number of Manufacturers
Unitary Air-Conditioner Packages (under 135,000 btu's)	$328,000,000	67
Unitary Air-Conditioner Packages (135,000 btu's and over)	47,000,000	26
Room Fan Coil and Room Air Induction Air-Conditioners	29,000,000	28
Centrifugal Liquid-Chilling Packages	63,000,000	7
Absorption Liquid-Chilling Packages	25,000,000	6
Reciprocating Liquid-Chilling Packages	42,000,000	20
Central Station Air-Handling Units	55,000,000	27
	$589,000,000	

Members of ARI, in a number of instances, have been and are now engaged in disputes with various craft unions concerning the installation of their packaged equipment such as centrifugal liquid-chilling packages, central station air-handling units (unit ventilators), room fan coil air conditioners, and other types of prefabricated and preassembled machinery and equipment. Their customers have been faced with strikes, threats to strike and other forms of economic pressure to prevent their installing such products. As in the instant case, the unions' demands are predicated on the claim that the packaged units encroach on the work done in the past on the job site.

As does MCA, ARI believes that if the Board correctly held that under certain circumstances the Carpenters' Union may lawfully ban the installation of prefabricated doors, it follows that under similar circumstances other unions may with equal impunity prohibit the installation of prefabricated products manufactured by its members. ARI's interest in the instant proceedings, therefore, is clear.

D. The National Association of Home Builders

The interest of The National Association of Home Builders (herein called NAHB) also is similar to that of the AGC.

The NAHB is a national trade association of over 46,000 members affiliated with 403 local and state associations in each of the fifty states, Puerto Rico and the Virgin Islands. Its membership annually performs the largest share of new residential construction throughout the United States. Residential building is the largest single segment of the construction industry. As such, the impact of new residential construction is a major force in, and spreads throughout, the entire American economic structure.

The residential construction industry is the prime consumer of hundreds of thousands of construction products, equipment, materials and supplies necessary to provide housing in sufficient quantity to satisfy the needs of the American home buyers. Similarly, the industry's nature is one of high competition and flexibility. The builder in the industry to be continually successful must be able to utilize new, and sometimes revolutionary, construction processes, materials and equipment to produce housing as a product competitive

with others in the market. To a very substantial degree these new products consist of factory made substitutes for products and equipment in the past fabricated in part or in whole on the construction site.

Accordingly, this industry, which last year performed new residential construction valued at over 21 billion dollars and provided close to three million jobs, is extremely sensitive to any artificially imposed rules or restrictions on the use of products and materials. Such rules can, and most often do, seriously impair the efficiency and flexibility of construction operations. If such rules are permitted to be lawfully imposed on a general basis throughout the industry to one category or group of products or materials—*e.g.*, prefabricated articles as in the instant case—the economic interests of the builders, as well as those of the manufacturers and their employees, will be detrimentally affected in serious degree.

E. The American Plywood Association

The American Plywood Association is a non-profit trade association representing the softwood plywood industry in the United States. The Association is involved in plywood technology, testing and inspection of plywood, product development and promotion and product research.

The use of softwood plywood in residential construction and commercial building has increased at a rapid rate since the end of World War II. Much of this increased utilization of softwood plywood has been brought about by the development of plywood components. The modern trends in housing and commercial building construction indicate substantial construction industry efforts to conserve labor, time, and money.

Fabrication of components at off-site locations on an assembly line or manufactured basis has been a logical development of the construction industry over the last 20 years, in the interest of both greater economy and a better product. This trend toward economy in construction has been largely passed on to the consumer, making new construction, even in this day of inflation, still a good buy.

The particular concern of the American Plywood Association in this case is that judicial approval of the union's conduct may well result in the virtual elimination of off-site fabrication of components in residential and commercial construction. Such a limitation would be a giant step backward, against all natural tendencies in the building construction industry. Its effect would undoubtedly be to restrict many markets now available to softwood plywood and to reduce substantially the availability of softwood plywood as a building material to the consuming public.

F. The National Forest Products Association

The National Forest Products Association (herein called NFPA) is a national trade association, a federation of seventeen regional lumber and wood products associations situated throughout the United States. These federated associations are the following: American Walnut Manufacturers Association; American Wood Preservers Institute; Appalachian Hardwood Manufacturers, Inc.; California Redwood Association; Canadian Wood Council; Fine Hardwoods Association; Hardwood Dimension Manufacturers Association; Hardwood Plywood Manufacturers Association; Maple Flooring Manufacturers Association; National Oak Flooring Manufacturers Association; National

Woodwork Manufacturers Association; Northeastern Lumber Manufacturers Association, Inc.; Northern Hardwood & Pine Manufacturers Association; Red Cedar Shingle & Handsplit Shake Bureau; Southern Cypress Manufacturers Association; Southern Hardwood Lumber Manufacturers Association; Western Wood Products Association.

Through these federated associations NFPA represents more than twelve hundred lumber and wood products manufacturers. The lumber and wood products industry is the fourth largest employer of labor in the United States among manufacturing industries and is responsible for a proportionate share of the gross national product. The industry supplies wood products in varying degrees of prefabrication from lumber cut to size to prefinished doors—the subject matter of this suit.

In an attempt to develop better products at lower prices there is a trend in the forest products industry to market wood products which run the full course of prefabrication. This is undertaken in an attempt to pass on to the American consumer the economies and technological improvements inherent in prefabrication. Among the items manufactured by the forest industry are: doors, windows and window units, prefinished siding, prefinished plywood and lumber precut to length.

A decision adverse to the petitioning association in this case could cause severe economic damage to an industry already engaged in fierce competition with other industries manufacturing competitive building materials—aluminum, steel, masonry, concrete and plastics—and would jeopardize the employment of thousands of employees in the forest products industry.

G. The Chamber of Commerce of the United States

The Chamber of Commerce of the United States (herein called the C of C) is an organization comprised of over 3,900 local, state and regional chambers of commerce and trade and professional associations. These groups and associations, in turn, have an underlying membership of approximately 4,500,000. In addition, the C of C has a direct membership in excess of 32,000 corporations, firms and individuals.

Members of the C of C manufacture a wide variety of prefabricated or packaged items. A partial listing of these includes pre-glazed sash windows; assembled shower doors and patio doors; preassembled structural metal used for entrance ways and curtain wall construction; fabricated steel power cables; plumbing fixtures; electrical switchboards; electrical distribution systems (busbars); lighting fixtures; boilers; prepared fiberglass pipe-insulators; prefabricated pipe clamps and fittings; pre-cut steel pipe bands. At one time or another various unions have refused to install each of these items on the ground that they were manufactured at a shop or factory and not produced or assembled at the installation site by members of the union involved.

Hence, on the basis of this prior experience of its members, and the threat to the future manufacture of a broad range of prefabricated or packaged products or equipment if the unions' conduct here is deemed permissible, the interest of the C of C is plain.

H. Experiences of Amici

As the reported cases disclose, general contractors and mechanical and other subcontractors, who constitute the membership of *amici* AGC,[3] MCA and NAHB, over the years have suffered innumerable threats of work stoppages and actual refusals to work by the various building trades craft unions because of the employers' utilization of prefabricated materials or products.[4] These threats and work stoppages invariably have stemmed from the claim that the prefabricated material or product in one manner or another entrenched on the work opportunities of the unions' members. This has had its back-lash effect on the members of the other *amici*, which manufacture prefabricated or packaged products and equipment. They are affected most critically by the return of their prefabricated products and the cessation of future orders. Often there is only the wasteful necessity of reimbursing the contractor for the redoing of work on

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[3] Three of the four contractors involved in the instant cases are members of the AGC; the fourth previously was a member.

[4] See, *e.g.*, *Wadsworth Building Co.*, 81 NLRB 802 (1949); *Joliet Contractors Ass'n*, 90 NLRB 542 (1950); *General Millwork Corp.*, 113 NLRB 1084 (1955); *Sand Door & Plywood Co.*, 113 NLRB 1210 (1955); *Booher Lumber Co.*, 117 NLRB 1739 (1957); *Mengel Co.*, 120 NLRB 1756 (1958); York Corp., 121 NLRB 676 (1958); *Del-Mar Cabinet Co.*, 121 NLRB 1117 (1958); *Midwest Homes, Inc.*, 123 NLRB 1806 (1959); *Mechanical Contractors Ass'n of New York*, 124 NLRB 521 (1959); *Burt Mfg. Co.*, 127 NLRB 1629 (1960); *MacDonald-Scott & Associates*, 131 NLRB 787 (1961) *Martin Co.*, 131 NLRB 1010 (1961); *Cardinal Industries*, 136 NLRB 977 (1962); *Speed-Line Mfg. Co.*, 137 NLRB 1410 (1962); *Insul-Coustic Corp.*, 139 NLRB 659 (1962); *Cardinal Industries*, 144 NLRB 91 (1963); *Reilly-Benton Co.*, 149 NLRB 1075 (1964); *Houston Insulation Contractors Ass'n*, 150 NLRB 1626 (1965); *American Boiler Mfrs. Ass'n*, 154 NLRB No. 12, 59 LRRM 1727 (1965).

the job-site which already had been done in the factory, plus the violation thereby of the factory tested and sealed packaged product. In either event, a union's power lawfully to dictate the product, or condition of the product, to be utilized is a serious impediment to the economic progress of the country, and to the interests of the *amici*.

II. SUMMARY OF ARGUMENT

1. The attempts of unions, as evidenced here, to dictate the product or condition of the product to be used or installed, would, if successful, constitute a serious impediment to technological innovation, and hence to the economic progress of the nation. Whether the device used to accomplish this aim be insistence upon contractual provisions restricting the employer's use of products or equipment offensive to the union, or an outright work stoppage, the effect is to restrain contractors from using, and in turn manufacturers from making, prefabricated products that are generally less costly, of better quality and design, and often safer, than their traditional counterparts assembled in more haphazard fashion at the actual site of installation or construction.

There has been a steady and impressive growth over the years in production and use of prefabricated materials. This is not surprising, for prefabrication is a factory process whereby the product is manufactured and assembled in accordance with the latest manufacturing techniques and subjected to standardized and often rigorous quality controls. As the result of technological advancements in manufacturing, new markets have opened, new industries have arisen, and new pro-

ducts and services developed. The consumer is the ultimate beneficiary of these technological gains.

The unions' insistence upon fabrication or assembly at the construction site is an economically wasteful policy designed to keep from the market, solely because of union pressures, desirable and less costly products and equipment. Their action in this regard, if deemed permissible, would constitute a giant step backward—a resistence to the very change that has become the hallmark of the American industrial system. Union imposed restrictions on the use of products or equipment would stifle the technological advancement needed to raise national productivity.

2. Should the unions succeed in restraining the use of various products, the impact upon both contractors and manufacturers would be severe indeed. To the contractor, the loss of flexibility in the performance of his contract—the inability to develop his own material specifications in light of his knowledge of their suitability, costs, warranties, and the like—is perhaps the most serious long-run consequence. Union restrictions in this regard would place a contractor at a serious competitive disadvantage with respect to other contractors who are not similarly encumbered. As far as the manufacturers are concerned, a union's insistence upon on-site fabrication jeopardizes a well established system whereby equipment or products are certified as having met standard tests for capacity and safety, as well as a system of warranties covering defects in workmanship and material. Both the certification program and warranties are applicable only to products and equipment in the condition they leave the factory, and would be voided if prefabricated or

packaged equipment was to be dismantled and then reassembled at the construction site.

3. Wholly apart from these serious economic consequences, the contractual provision and the unions conduct to enforce it fly in the face both of the flat prohibitions of Sections 8(b)(4)(A) and (B) and Section 8(e), and the clear expressions of the Congressional intent in promulgating them. Rule 17, incorporated in the agreements between the unions and contractors in the case at bar, prohibits union members from handling various prefabricated items, including doors assembled at a factory rather than at the construction site. The text of the rule, and the unions' attempts to enforce it, are representative of union efforts along this line. The intent of the unions to prohibit the use of particular products is beyond question. There is nothing on the face of the statute that even hints at a Congressional intent to excuse any kind of product boycott.

Although the unions and the Board suggest that there is an implied exception to the prohibition against product boycotts, where the union is seeking to preserve work for its members, the fact remains that product boycotts undertaken to preserve work were among the main evils that Congress intended to eradicate. During the debates preceding enactment of the Taft-Hartley Act in 1947, Congressional attention was focused on the activities of the IBEW in New York (see *Allen-Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797) and the long-standing disputes between the Carpenters Union and Machinists Union over the erection and dismantling of machinery (see *U.S. v. Hutcheson*, 312 U.S. 219). In view of the legislative history there can be no doubt that, notwithstanding the

attempts of these unions to hold work for their members, Congress was intent on making such activities unlawful and accomplished this purpose through the enactment in 1947 of Sections 8(b)(4)(A) and 8(B)(4)(D). Indeed, in the earliest case construing the application of Section 8(b)(4)(A) to product boycotts, *Wadsworth Building Co.*, 81 NLRB 802 (1949), the Board properly acknowledged the Congressional intent to bar product boycotts irrespective of a union's claim of economic justification.

The Landrum-Griffin Act of 1959 confirmed the Taft-Hartley ban on product boycotts, and increased the effectiveness of the ban by prohibiting agreements between employers and labor unions which otherwise, in the face of *Sand Door,* would have been lawful. Although the original bill proposed in the Senate, S. 1555, and its companion in the House, H.R. 8342, would have banned hot-cargo agreements only between common carriers and unions, the bill proposed by Representatives Landrum and Griffin, H.R. 8400, which in substance became the Landrum-Griffin Act, swept far beyond common carriers and reached *all* hot-cargo agreements, irrespective of the character of the employer's business. Once again, the legislative history reveals the intended broad reach of the proscription. Only two exceptions were drawn—a broad exemption for the clothing industry, and the narrow exemption applicable to the construction industry relating to work "to be done at the site." As the House Conference Report makes clear, this latter exemption did not protect agreements relating to products or materials delivered to the construction site. They remained unlawful.

4. A sharp distinction exists between an employer's selection of products to be used and an employer's

routine subcontracting of work. Although the type of subcontracting undertaken in *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, was held to be a mandatory subject of bargaining, no such duty attaches to the employer's selection of products or equipment to be used. Unlike *Fibreboard,* which involved solely the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work in the same place, the selection of products involves such basic management prerogatives as the investment of capital and the basic scope of the enterprise—matters wholly outside the area of mandatory bargaining.

III. ARGUMENT

A. The Board's Interpretation of the Act Is Applicable to All Prefabricated Materials, Discourages Technological Improvement and Encourages Continuance of Uneconomic Practices, Jeopardizes Systems of Certifications and Warranties, and Impairs the Utilization of Contractors

1. The Board's decision would permit wide-spread blacklisting of prefabricated products on the claim of work preservation

The complaint of the Board's General Counsel was bottomed on the contract clause "Rule 17" (J.A. 121-123) and its enforcement. This particular contract clause is limited to prefabricated doors and trim designated as "base, chair rail, picture moulding" (*ibid*). However, it is a typical anti-prefabricated products clause. The Carpenters' Unions in some jurisdictions have even more extensive bans on the use of prefabricated material.[5] Other craft unions, such as the Sheet

[5] See, *e.g., Sand Dood & Plywood Co.,* 113 NLRB 1210, 1212; *Booher Lumber Co.,* 117 NLRB 1739; *Mengel Co.* 120 NLRB 1756, 1757; where the bans were against the installation of any products not manufactured by members of the Carpenters' Union.

Metal Workers,[6] the Plumbers and Pipefitters,[7] the Electricians,[8] and the Glaziers,[9] employ similar contractual prohibitions to curb the use of prefabricated material and equipment. The prefabricated materials and equipment manufactured today range from the relatively simple door assemblies involved in the instant case to the highly complex equipment such as that installed by MCA members (*supra,* pp. 5-6), and that manufactured by ARI members (*supra,* pp. 7-8).[10] These prefabricated products, while covering a wide range of equipment of various types, are identical in that (1) they are factory made, frequently under assembly line conditions similar to those employed in the manufacture of automobiles and like products, and (2) their use over the years unquestionably has tended to diminish the on-the-job opportunities of members

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[6] See, *e.g., York Corp.,* 121 NLRB 676; *Mechanical Contractors Ass'n of New York, Inc.,* 124 NLRB 521; *Burt Mfg. Co.,* 127 NLRB 1629.

[7] See, *e.g., MacDonald-Scott & Associates,* 131 NLRB 787; *American Boiler Mfrs. Ass'n,* 154 NLRB No. 12, 59 LRRM 1727.

[8] See, *e.g., Allen-Bradley Co.* v. *Local Union No. 3, IBEW,* 325 U.S. 797; *Martin Co.,* 131 NLRB 1010.

[9] See, *e.g., Joliet Contractors Ass'n,* 99 NLRB 542; rev'd 193 F. 2d 833 (C.A. 7); supplemental decision, 99 NLRB 1391; enf'd 202 F. 2d 606 (C.A. 7); cert. denied 346 U.S. 824.

[10] One of the more striking examples of the complexity of the prefabricated items being produced is the air separation plant manufactured for Wheeling Steel Corporation reported in *Business Week,* May 28, 1960, p. 107. This plant was reported as capable of pumping 200 tons of liquid oxygen a day. For shipping purposes, the plant was divided into six "building blocks", of which the largest weighed 50 tons and measured 88 feet by 12 feet. One of the noted advantages of the prefabricated plant over a field constructed one was the substantial reduction of dust and dirt in the interior of the prefabricated plant.

of craft unions, such as Carpenters, Sheet Metal Workers, Plumbers and Pipefitters, Electricians, and Glaziers.

The efforts of these and other unions to retain work threatened by the development and use of prefabricated material and equipment, or to recapture work long since lost to the technological advance of such prefabricated material and equipment, by rules and contract provisions and threats and work stoppages to enforce them, are indistinguishable in purpose, method and effect. If the Carpenters' Union, as here, may lawfully prevent the installation of prefabricated doors[11] and trim, and enforce such ban by refusals to install the banned products, it may also prevent the use of all other prefabricated items whose installation may diminish the job opportunities of its members, such as prefabricated housing or building units, prefabricated wall or wall paneling units, prefabricated floor units, prefabricated staircases, prefabricated trusses or roof supports, factory made kitchens, etc.[12] If the Carpenters' Union may lawfully do this, so may each of the other traditional craft unions. If the craft unions may, with legal propriety do this, so may any other union do likewise to retain or recapture work lost to the technological advances of the years. Thus, the factory union which has lost the fabrication of a component of the factory's product to a more efficient

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[11] As noted in *Building Supply News*, March 1961, p. 100, "originally doors were handmade at the site." Under the Board's decision, the Carpenters' Union could equally refuse to install "milled" doors for the same reason it here refused to install prefitted or precut doors.

[12] See *Practical Builder*, April 1964, p. 106, for statistics on the extent of the usage of such prefabricated components.

and economical unit fabricated by another employer may under the Board's decision here shut down the factory to retain or recapture the lost work.

It therefore is apparent from the above and from the statements of the interests of the *amici* here, representatives of a large segment of the contractors who install prefabricated products and the employers who manufacture them, that the question presented to this Court by the decision of the Board herein is far more important than the immediate issue of the installation of prefabricated doors. Rather, the issue here spans the entire field of developing, marketing and installation of all prefabricated products and equipment which modern society needs today for advancement. If the Carpenters' Union here may control the manufacture and distribution of prefabricated doors by refusing to install them on the assertion that it is seeking merely to retain or recapture work that it has done in the past, it follows that unions may by this means substantially stifle all technological advance in the development and use of prefabricated or packaged products. For example, factory machines formerly run from a central power source operating a belt and pulley system now, for the most part, derive their power from self-contained motors and engines. Machine controls formerly installed on the walls of the factory now are an integral part of the packaged machine. Functions only recently performed by vacuum tubes and thermostats are now performed by transistors. The unions which traditionally had installed or manufactured the old can, if the Board is correct in its holding, substantially dictate the technological development and distribution of the new by their refusals to install the latter on the ground that the latter reduces their work opportunities.

It is no answer to argue that the unions so far may have restrained themselves to demand retention only of part of the work; if they have that right, they have the right to demand retention or return of all of the work.

2. The Board's decision would discourage technological advance and encourage economic waste

The importance to the national economy of the production of prefabricated units is illustrated by the growth in the sale of prefabricated houses. In 1950, only about 5 percent of the single-family dwellings built in the United States were prefabricated; in 1961, it was 15 percent, a three-fold increase in eleven years;[13] in 1964, after a steady increase for 13 years, it was over 22 percent;[14] in 1975, it is predicted that 40 percent of all single-family dwellings will be prefabricated.[15] In 1961, 140,000 prefabricated housing units were shipped—an increase of 10 percent over the preceding year.[16]

"The key to the cost advantage [in prefabrication] is the economies and efficiencies producers gain from mass-production of standardized parts."[17] Sales of pre-engineered, or packaged buildings other than homes rose 15 to 25 percent in 1965, capturing approximately 10 percent of the commercial and industrial market for one-story buildings, as opposed to 5 per-

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[13] *Chemical Week*, June 3, 1961, p. 87.

[14] *Parents' Magazine & Better Home Making*, August 1965, p. 80.

[15] *Chemical Week*, June 3, 1961, p. 87.

[16] *Business Week*, November 18, 1961, p. 170.

[17] *Business Week*, April 9, 1966, p. 48.

cent 5 years ago.[18] These various structures include shell housing, mobile homes, odd-lot custom housing, row houses, garden apartments, motels, nursing homes, schools, dormitories,[19] supermarkets, bowling alleys, banks, office buildings, factories and warehouses.[20]

For the years 1959 through 1962, the annual shipment of prefabricated wooden buildings and structures averaged about $313,000,000, and of prefabricated and portable metal buildings about $191,000,000.[21]

The growth in the production of prefabricated construction products has had important collateral economic effects. New markets have been opened. For example, prefabricated houses have extended the availability of new homes to persons in the lower income brackets.[22] The sales of prefabricated "shell" homes have been greatest in the low-income area of the South; prefabricated "mobile" homes are popular with itinerant workers and retired individuals living on a fixed income.[23] Prefabricated plastic housing has found a market among migratory farmworkers in California.[24] With the expansion in the production of prefabricated homes has come the development and production of new materials. New adhesives and coatings have been developed; factory-finished floors have been designed

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[18] *Ibid.*, p. 50.

[19] *House & Home*, November 1963, p. 92.

[20] *Business Week*, April 9, 1966, p. 48.

[21] *Standard & Poor's Industrial Surveys*, July 16, 1964, Sec. 2, p. B77.

[22] *Chemical Week*, June 3, 1961, p. 87.

[23] *The Magazine of Wall Street*, April 22, 1961, p. 123.

[24] *Fortune*, April 1966, p. 170.

and produced; and conventional construction items, such as wood and metal, are being replaced by newer plastics and foams.[35]

The increase in production of prefabricated items in other fields has kept abreast of the expanded use of prefabricated housing. This is demonstrated by the broad range of packaged and prefabricated items manufactured and installed by the *amici* herein, frequently over union protests. This development and use of prefabricated products and materials is not surprising. Prefabrication is a factory process, whereby the product is manufactured and assembled in accordance with the latest manufacturing techniques and subjected to standardized and often rigorous quality controls. As a result the prefabricated product is likely to be less costly, of better quality and design and often safer than its traditional counterpart assembled in less uniform and frequently more haphazard fashion at the site of construction. The consumer of course is the direct beneficiary of these technological advances.

The insistence by unions in the building trades, under threat of product boycotts, that union members be permitted to tamper with packaged equipment and to do over again work already completed at the factory, such as cutting, fitting, hanging, inside piping, wiring, or the installation of controls, can only lead to an increase in the cost of installed products and equipment. This concerns the manufacturer, the installing contractor and the public, which latter pays the bill.

Ambassador Arthur J. Goldberg, when Secretary of Labor, in 1961, aptly summed up the importance to the

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[35] *Chemical Week*, June 3, 1961, pp. 87-89.

American economy of technological advancement in testimony before the House of Representatives' Holland Subcommittee on Unemployment and the Impact of Automation of the Committee on Education and Labor. There he stated:[36]

> "Let me say at the outset that we in the Department of Labor regard automation and other technological advancement as an essential and desirable development for maintaining the strength of the U. S. economy. If we needed any reminder, the worldwide events of the last few weeks have recalled our attention to the fact that we must have a strong, progressive and technologically powerful nation to meet the demands that press on us from outside our borders. We face growing economic competition from many countries—a competition that American industry has successfully met in the past by the imaginative and efficient use of new technology with the resultant large increases in productivity.
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> "As a people, we have benefited from technological change and rising productivity. In the past 50 years, for example, gross national product per capita, that is, the total of private and public goods and services available per person, has more than doubled. This happened with a large increase in population, with no change in the proportion of the population that had to go to work, and with a shorter workweek and more vacation time per worker. It was accomplished, obviously, because of the large increase in productivity.
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> "New industries have arisen during this time. New products and services have made for an easier

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[36] Report of Subcommittee on Unemployment and the Impact of Automation, House Committee on Education and Labor, 87th Cong., 1st Sess., Impact of Automation on Employment, pp. 3-4 (Committee Print, 1961).

way of life—the automobile, plastics, antibiotics, better homes, and travel are a few examples.

"All of this indicates why automation and other technological progress is so important to the American economy and why it may be necessary to step up the pace rather than tone it down."

Concededly, technological advances have their temporary repercussions on individual employees. Those employees making the displacement products, as a group, gain work; those employees who made the displaced products, as a group, lose it. But this is the history of technological progress. The carriage maker succumbed to the automobile manufacturer, etc. But the net result is a total gain for employees as a class. Advancement in wages and working conditions is, in large measure, keyed to the growth in productivity. Technological improvement is a major factor in the latter.

From the standpoint of all, the unions' insistence upon fabrication or assembly at the construction site is plainly an economically wasteful policy designed to restrict the manufacture of particular products and retard the growth in productivity. If the cost of prefabricated equipment is raised or such equipment is prohibited through the imposition of restrictive work rules, the obvious result would be a curbing of the market for products protested by the unions, and hence a restraint upon the types of products to be manufactured. This in turn would keep from the market, solely because of union pressures, products and equipment which are often far more desirable and less costly than traditional products and equipment that have received the unions' acceptance, and thus stifle the technological advancement needed to raise national pro-

ductivity and support the desired improvements in wages and working conditions of rank-and-file employees.

3. Job-site reassembly jeopardizes certifications and warranties

Another detrimental feature of union insistence upon on-site fabrication is that it jeopardizes a well established system of certifications and warranties regarding certain packaged equipment that can be safeguarded only when the work is performed at the factory. At present, this packaged equipment is carefully tested at the factory and issues from the factory with a certification and warranty to the customer. In their efforts to make work at the construction sites for their members, the unions would supplant this careful testing of equipment at the factory, and the warranties based upon factory inspection and control, with a dismantling and reassembly at the site without comparable controls. Under such conditions the certifications and warranties of products manufactured by ARI members and others might well be voided.

First, where packaged equipment is covered by an ARI certification program, the manufacturer certifies that the equipment has met certain tests for capacity and safety. These tests are conducted under carefully specified conditions on a prototype at the Electrical Testing Laboratory in New York or take place at the factory itself and are witnessed by personnel of the Electrical Testing Laboratory. In either case, the certification applies to the packaged equipment in the condition it leaves the factory. If inside piping, wiring, or controls are removed and then reinstalled by union members *at the job site,* the manufacturer cannot be expected to take responsibility for work he does

not supervise and obviously he cannot be required to certify the capacity and safety of such modified packaged equipment. The unions' "make work" policy threatens this useful program of product certification.

Second, a similar problem exists with respect to warranties. These are of varying duration and apply not only to the packaged assembly, but also to the more important components, such as the hermetic compressor. Customarily, they cover defects in material and workmanship but do not apply where the assembly or component has been subject to abuse. These warranties frequently contain a provision reading "Deviations from recommended applications, system design, installation and service practices, may be considered abuses and not covered by the X Company warranty." Here again, if union members on the job site are permitted to replace the piping of a system already charged with refrigerant and already checked for leaks at the factory, the manufacturer's warranty of the product may be voided. Similarly, revising of equipment at the job site may nullify a previously affixed Underwriters Laboratory (UL) label. Thus, the practices of the unions, in addition to increasing the cost of installed packaged equipment, run counter to established certification and warranty programs designed for the benefit of the public and have the serious collateral effects of undermining and diluting the manufacturer's responsibility for the integrity of his product.

4. The Board's decision hampers the proper performance of the contractor's function

To the general contractor and the mechanical contractor, the loss of flexibility in the performance of their functions is perhaps the most harmful consequence, in the long run, of the Board's current interpretation of the Act. It is common practice for the project owner to award the construction contract to a general contractor with only general instructions as to the types of materials or equipment to be installed. Some contracts specify the particular materials or equipment, but it is frequently the case that the owner relies upon the general contractor's awareness of the most useful or the newest products on the market, and leaves it to the general contractor to secure the most suitable products and equipment for his needs at the lowest cost.

Hence, a measure of the competence of a general contractor, and a factor in the owner's selection of one general contractor over another, is the contractor's ability to develop his own material specifications in the light of his knowledge of their cost, their safety features, their ability to meet the needs of the job, their warranties, and the like. Insofar as prefabricated materials are less costly than similar materials put together at the construction site, their selection by the contractor will effect a cost saving. Moreover, with prefabricated material the contractor is better able to control his performance on the job—the quality and scheduling of work—for the packaged or prefabricated product has already been assembled at the factory.

A narrowing of the products available to a contractor, particularly prefabricated products, seriously impairs his ability to perform his job. It is obvious that the general contractor who is most flexible in this area —one who not only is aware of the most appropriate

products but is unencumbered by union restrictions in dealing with any manufacturer or contractor who can fulfill his requirements—stands in the most advantageous position in securing and performing general contracts.

The mechanical contractor is similarly situated, for he too is often entrusted with the determination of the particular equipment to be used. His contract may contain only a general description of the equipment to be installed, or the contract may specify the equipment of a particular manufacturer but provide the option of installing the equivalent of that manufacturer's equipment. In either event his specialized knowledge of the products in his field is relied upon, and his selection of material or products is essential to his performance. When he retains the flexibility to implement his best judgment without union restrictions, it will frequently result in the selection of better equipment at a cost saving, to the benefit of the owner.

Plainly any union-imposed restrictions upon the products they can use diminishes the usefulness of the general contractor and the mechanical contractor to whomever would contract for their services. A contractor's inability to secure and install prefabricated products or equipment, which often are the most useful and the least costly, because of union restrictions places such contractor at a serious competitive disadvantage with respect to other contractors who are not similarly restricted.

Moreover, construction contractors are highly vulnerable to the coercive techniques—and the hot cargo proposals—of unions because of the special features of a construction project. Because of the interdependence of crafts and of the contractors themselves, a picket line or work stoppage against a recalcitrant

mechanical contractor, for example, may bring the entire construction project to a halt, with consequent economic detriment to all contractors at the site. A union's bargaining leverage to secure a "fabrication clause" under such circumstances is indeed great, because the threat of shutdown of a project inevitably embraces not only the contractor against whom the union is asserting its work preservation claims, but also the bulk of the contractors engaged in work at the project however far removed they may be from participation in the actual dispute. See *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.* (*Sand Door & Plywood Co.*), 357 U.S. 93, 106.

B. The Contract Provision and the Unions' Conduct To Enforce It Violated the Plain Language of Sections 8(b)(4)(A) and (B) and Section 8(e) of the Act; Congress Intended These Prohibitions To Apply Without Limitation to the Product Boycotts Here

The complaint of the General Counsel of the Board charged that Rule 17 (J.A. 119)[27] and the conduct of

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[27] Rule 17, incorporated in the Unions' agreements with the contractors, reads as follows:

> "Rule 17. No employee shall work on any job on which cabinet work, fixtures, millwork, sash doors, trim or other detailed mill work is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America. No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections."

The first sentence of the Rule is not here involved. The Board found that the restrictions there contained do violate Section 8(e) of the Act, and that finding was not challenged by the Unions in the Court of Appeals (J.A. 23).

the Unions here to enforce it violated Sections 8(b)(4)(A) and (B) and Section 8(e) of the Act.[28] The Board dismissed the charges that Rule 17 and the Unions' conduct violated Sections 8(b)(4)(A) and

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[28] These sections provide, in pertinent part, as follows:

"Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

"(A) forcing or requiring any employer or self-employed person * * * to enter into any agreement which is prohibited by section 8(e);

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

* * * * *

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person

8(e), holding that the Rule was a lawful "work-preservation" provision. For the same reason, the Board dismissed the charge that the refusal to install the prefabricated doors on the Frouge project, where the contract did not specify the type of doors to be used, violated Section 8(b)(4)(B) of the Act. However, it found a violation of the latter section in the refusal to handle the doors on the Nason, McDonnell and Driscoll projects because the specifications on those projects required the use of precut doors. The Court of Appeals reversed the Board's dismissal of the Section 8(b)(4)(A) and 8(e) charges but, anomalously, upheld the action of the Board in distinguishing under Section 8(b)(4)(B) the Unions' conduct on the Frouge project from that on the other three projects.[29]

It is the position of *amici* here that Rule 17 *in toto* is the type of agreement expressly prohibited by Section 8(e) and that the Unions' conduct on all four proj-

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engaged in commerce or in industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

[29] The court below seems to have endorsed the Board's finding of no Section 8(b)(4)(B) violation on the Frouge job on a misinterpretation of the "primary strike or primary picketing" proviso added by the 1959 amendments. However, this Court explained the limited purpose of this proviso in *Local 761, International Union of Electrical, Radio & Machine Workers* v. *N.L.R.B.*, 366 U.S. 667, 681. These *amici* will not further discuss this point as it is anticipated that it will be thoroughly covered in the briefs of the parties.

ects to enforce adherence to this clause is expressly forbidden by Sections 8(b)(4)(A) and (B).

Section 8(e) expressly prohibits "*any* contract or agreement, *express or implied,*" whereby an employer agrees with a labor organization to refrain from "handling, using, selling, transporting or otherwise dealing in *any* of the products of *any* other employer, or to cease doing business with *any* other person" (emphasis added). The only exemptions from this sweeping prohibition are (1) the limited exemption for the construction industry, relating to "work *to be done* at the site of the construction" (emphasis added), and (2) the broad exemption for the "apparel and clothing industry". Section 8(b)(4)(A) likewise clearly proscribes conduct of the nature here engaged in by the Union where "*an* object" is to require "*any* employer" to enter into "*any* agreement" prohibited by Section 8(e) (emphasis added). Section 8(b)(4)(B) similarly proscribes such conduct for "*an* object" of requiring "*any* person" to cease "using, selling, handling, transporting, or otherwise dealing in the products of *any* producer" or to cease "doing business with *any* other person" (emphasis added). This Court held in *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 689, that the object proscribed by the Act need not be "the *sole* object" of the union's conduct in order for the union to violate the Act.

It cannot be successfully contended that Rule 17 and the Unions' conduct to enforce it do not come within the clear prohibitions of Sections 8(e), and 8(b)(4)(A) and (B). Rule 17, in the language of Section 8(e), plainly required the contractors to "refrain from handling, using * * * the products [material coming

from a mill where cutting out and fitting had been done for butts, locks, letter plates or hardware of any description, [or] any doors * * * which have been fitted prior to being furnished on job] of any other employer" [the manufacturers of such doors]. In the language of Sections 8(b)(4)(A) and (B), the Unions' conduct had "an object" of "requiring any employer [the contractors] * * * to enter into" the aforesaid agreement "prohibited by section 8(e)", and of "requiring any person [the contractors] to cease using, * * * handling * * * the products of any other producer, processor, or manufacturer" [the manufacturers of the prefabricated doors]. Nothing on the face of the statute suggests that Congress did not intend its application to the situation here—a product boycott—even though the defense to the boycott might be the claim that the union was seeking to preserve work for its members. To the contrary, the statute on its face discloses the Congressional rejection of such an exception to the statutory prohibitions.

The provisions of Section 8(b)(4)(B) here involved (then part of Section 8(b)(4)(A)) were enacted during the major overhaul of the Act in 1947. This overhaul was generated in part by the public attention focused on certain excesses on the part of unions, in many instances assertedly to retain or obtain work for their members or employees represented by them—in other words, work preservation conduct. In the forefront at that time were the disclosures in *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797, that the union, "to make more work for its own members", "using conventional labor methods, such as strikes and boycotts," obtained "closed shop agreements in the New York City area" under which "contractors were

obligated to purchase equipment from none but local manufacturers who also had closed shop agreements with" the union (at p. 799). Another work-preservation practice of the unions on which Congress focused attention in 1947 was the so-called "jurisdiction dispute", typified by the long-standing dispute between the Carpenters and Machinists as to whose members should be assigned the erection and dismantling of machinery, which problem was before this Court in *U. S.* v. *Hutcheson,* 312 U.S. 219.

Congress, looking directly at the unions' stratagems for preserving or securing work—the closed-shop, the secondary boycott and the jurisdictional dispute—banned them all (Sections 8(b)(2), 8(b)(4)(A) (now part of (B)) and 8(b)(4)(D)). The only exception on the face of statute as amended in 1947 to these sweeping bans was the one attached to Section 8(b)(4)(D)—which prohibits jurisdiction disputes—excluding from its prohibition work stoppages to compel an employer to adhere to a Board's certification of the bargaining representative.[30]

Thus, it is evident from the amended statute itself that Congress in 1947 did consider the question of whether unions should be permitted to engage in conduct then being proscribed in an effort to hold or gain work for its members and rejected such a contention, contrary to the current position of the Board as re-

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[30] Section 8(b)(4)(D) proscribes conduct having as an object—

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:"

flected in the instant case. In only one limited situation did the Act as amended then permit a strike for the purpose of preserving work. Where the employer assigned particular work to employees represented by one union in disregard of a Board certification of another union as the collective bargaining representative of the employees performing that work, a strike to compel reassignment of such work to employees represented by the certified union was removed from the proscription of Section 8(b)(4)(D). In all other instances, however, a strike or picketing to capture or retain work was declared illegal.

The earliest case in which the Board explored at length the scope of the Section 8(b)(4)(A) prohibition against the "product boycott" was *Wadsworth Building Co.*, 81 NLRB 802 (1949), enf'd 184 F. 2d 60 (C.A. 10). There the Carpenters' Union induced a contractor's employees not to erect the prefabricated homes of Wadsworth. The Carpenters contended that its action was economically justified and necessary to protect its wage scale in the area which was being threatened by the erection of the cheaper-made Wadsworth houses and was therefore outside the ban of Section 8(b)(4)(A). The Board expressly rejected this argument, saying (at p. 806):

> "* * * However, both the express language of Section 8(b)(4)(A) and its legislative history disclose a contrary intention. In fact, not only does it appear from the legislative debates and Committee Reports that *Congress considered the 'product boycott' one of the precise evils which that provision was designed to curb*, but also Senator Taft, one of the sponsors of the Act, and Senator Ball, in reply to the critics of the section

> in question, emphasized without qualification that all boycotts were equally indefensible and unjustified. * * *" (emphasis added)

Chairman Herzog, in his concurring opinion, stated the Congressional objective as follows (at p. 821):[31]

> "It seems clear to me that Congress was attempting to deal a death blow to secondary boycotts, *whether for economic or for other objectives,* and desired to use all the power at its command to eliminate them from the American industrial scene. Evidence of that intention runs through the legislative history in both Houses. * * * (emphasis added)

There has been no subsequent change in the language of the Act insofar as Section 8(b)(4)(A) is concerned, except in 1959 to transplant its provisions to the present Section 8(b)(4)(B).[32] Therefore, there should be no change in its interpretation by the Board.

The new Section 8(b)(4)(A), insofar as here involved, and Section 8(e) were added to the Act by the

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[31] The dissenting members did not challenge the majority's interpretation of the sweep of the Congressional objective but would have held that Congress did not prohibit the conduct there engaged in to accomplish the objective—peaceful picketing and publication in its "We do not patronize" list (see, *ibid.*, pp. 822-830).

[32] The "primary strike or primary picketing" proviso added in 1959 when the provisions of Section 8(b)(4)(A) were transferred to Section 8(b)(4)(B) did not change the scope of the section. See *Local 761, International Union of Electrical, Radio & Machine Workers* v. *N.L.R.B.*, 366 U.S. 667, 681; H.Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 38; *Legisl. Hist. 1959*, vol. I, p. 942 (the abbreviations *"Legisl. Hist. 1959"* refer to the *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, two volumes, published by the U.S. Government Printing Office in 1959).

1959 amendments. These two provisions were included in the then amendments to close "loopholes in the Taft-Hartley ban against secondary boycotts" (H.Rep. No. 741 on H.R. 8342, statements by Representatives Landrum and Griffin, 86th Cong., 1st Sess., p. 100; *Legisl. Hist. 1959,* vol. I, p. 858), not to open "loopholes" in such prohibition. Also, the predominant view was that these new amendments were to be interpreted as supplementary to and in harmony with the existing interpretation of the prohibition against secondary boycotts (after the amendments, contained in Section 8(b)(4)(B) of the Act). The Board so stated, *Cardinal Industries, Inc.,* 136 NLRB 977, 987 (1962). This likewise seems to have been the view of labor. As Professor St. Antoine (U.Mich. L.Sch.), then in the office of the AFL-CIO General Counsel, wrote shortly after the passage of the 1959 amendments (40 *U.Det. L.J.* 189, 206-207):

> "When an agreement is brought into question under Section 8(e) * * * the test generally should be whether a union would violate the secondary boycott ban of section 8(b)(4)(B) by inducing employee conduct of the type authorized by the agreement, or by inducing employees to make their employer do what he has committed himself to in the agreement. If the inducement would be a violation of section 8(b)(4)(B), the agreement should be held a violation of section 8(e)".

Again it is apparent from the face of the statute that Congress, in 1959, once more considered and rejected any contention that "product boycotts" of the nature involved here should be excluded from the secondary boycott prohibitions of the Act—after the 1959 amendments, contained in Sections 8(b)(4)(A)

and (B) and Section 8(e)—even when engaged in assertedly to retain or recapture work. Thus, as the 1959 amendments disclose, Congress again looked squarely at the claim that unions should be permitted in situations like the instant ones to engage in product boycotts to preserve work for their members and again rejected the contention. As the amendments also disclose, Congress expressly considered the claims of the unions in the construction industry—the industry directly involved in the instant cases—and extended to them only a limited exemption from the Section 8(e) ban on agreements not to handle the products of or to do business with another person. This exemption was expressly restricted to agreements relating to the "subcontracting of work to be done at the site of the construction" and creates no immunity for agreements relating to the purchase of products fabricated off the job site (*infra*, pp. 58-59). Moreover, Congress refused to extend even this limited exemption to the secondary boycott prohibitions of Section 8(b)(4)(B) by expressly restricting the exemption to "this subsection (e)" (*ibid.*). This limited exemption is contained in the first proviso to Section 8(e). The second and third provisos to Section 8(e) further disclose the deliberate Congressional intent to retain the ban of Section 8(b)(4)(B) against product boycotts of the kind here involved, and to include within the ban of the new Sections 8(b)(4)(A) and 8(e), agreements providing for such product boycotts. Congress, again looking squarely at the scope of these sections, in these latter two provisos substantially exempted the apparel and clothing industry from the provisions of all three sections thus disclosing a deliberate intent to make them all applicable to every other industry, except for

the limited exemption under Section 8(e) previously granted for the construction industry.

Thus, Congress, in enacting Section 8(e) prohibiting "*any* labor organization" and "*any* employer" from entering into "*any* contract, express or implied" whereby the employer agrees to refrain from "handling" or "using" "*any* of the products" of "*any* other employer", recognized the broad sweep of the amendment and chose only to grant the exemptions in the aforementioned three provisos—the limited one for the construction industry and the broader one for the apparel and clothing industry. Congress chose to grant no further exemption.

The Board in its decision here seeks to write into Section 8(e) a fourth proviso, exempting from its prohibitions product-boycott agreements claimed to be for the purpose of retaining or regaining work opportunities lost to a fabricated product. If this had been the Congressional intent, Congress could easily have written the fourth proviso itself. Moreover, the Board today seeks retroactively to amend Section 8(b)(4)(B)—formerly Section 8(b)(4)(A)—to exempt strikes to enforce product boycotts asserted to be for the purpose of preserving or obtaining work. But the Board's contention is contrary to the intention of Congress disclosed on the face of the statute. Moreover, it is contrary to the Congressional intent as evidenced by the legislative history of the 1947 and 1959 amendments of the Act.

C. The Legislative History of the 1947 and 1959 Amendments Clearly Shows Congressional Disagreement With the Board's Construction of the Secondary Boycott Provisions of the Act

1. The Taft-Hartley 1947 amendments

As stated previously (*supra*, p. 36), one of the examples of union abuses which generated the adoption of Section 8(b)(4)(A) in 1947 was the disclosure in the *Allen-Bradley* case of the unions' refusal, in order *to gain more work for its members* in New York City, to install any fabricated products and equipment coming into the City regardless of whether or not the fabricator's employees were represented by a union.

On January 6, 1947, the President in his message to Congress recommended certain changes in the Act, including a limited ban on secondary boycotts (93 *Cong. Rec.* 3529-3530; *Legisl. Hist. 1947*, vol. 1, p. 608).[33] On April 17, 1947, H.R. 3020, introduced by Representative Hartley, passed the House and was sent to the Senate (93 *Cong. Rec.* 3746-3748; *Legisl. Hist. 1947*, vol. 1, pp. 861-863). On the same day Senator Taft, as Chairman of the Senate Labor Committee, favorably reported out his own bill, S. 1126 (93 *Cong. Rec.* 3753, 3786; *Legisl. Hist. 1947*, vol. 2, p. 1000). Subsequently, the provisions of S. 1126 were substituted in the Senate for those of H.R. 3020 (93 *Cong. Rec.* 5298; *Legisl. Hist. 1947*, vol. 2, p. 1522), passed the Senate and, after certain changes agreed to in conference with the House (H. Conf. Rept. on H.R. 3020, 80th Cong., 1st Sess.; *Legisl. Hist. 1947*, vol. 1, pp. 505-573), were enacted as the Taft-Hartley amendments. Section

[33] The abbreviations "*Legisl. Hist. 1947*" refer to the *Legislative History of the Labor Management Relations Act, 1947*, two volumes, published by the U.S. Government Printing Office in 1948.

8(b)(4)(A), insofar as pertinent here, as finally enacted in H.R. 3020 was the same as reported out by Senator Taft in S. 1126.

Accompanying S. 1126 to the floor was S. Rept. No. 105 on S. 1126, 80th Cong., 1st Sess. (*Legisl. Hist. 1947*, vol. 1, pp. 407-453). In that report, the majority of the Senate committee expressly stated that Section 8(b)(4)(A) "makes it an unfair labor practice for a union to engage in the type of secondary boycott that had been conducted in New York City by Local No. 3 of the IBEW," citing the *Allen Bradley* case (S. Rept. No. 105, p. 22; *Legisl. Hist. 1947*, p. 428). Subsequently, during the debates on the floor, the proponents of S. 1126 reaffirmed the bill's prohibition of secondary boycotts like that in *Allen Bradley*. Thus, Senator Taft, in direct response to the criticism of Senator Pepper (93 *Cong. Rec.* 4323; *Legisl. Hist. 1947*, vol. 2, p. 1107), stated:

> "* * * the principal point of the Senator from Florida is similar to that in the case of the New York Electrical Workers' Union, which said, 'We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put into any building in New York City.' The principle announced by the Senator from Florida would make that stand lawful, as it is lawful today.
>
> "Of course we propose to change the law in that respect. * * *"

Senator Ellender similarly recited as one "of the most glaring examples of the secondary boycott" which would be prohibited under the amendments (93 *Cong. Rec.* 4255; *Legisl. Hist. 1947*, vol. 2, p. 1056), the

> "* * * New York Electrical Workers Union. * * * no employer who manufactures electrical equip-

ment outside of New York has a ghost of a show of having his equipment placed in the large buildings in New York City. When such equipment is sent to New York City, the IBEW local refuses to install it unless it is permitted to tear all the equipment apart and assemble it again. Of course, one can readily understand that such procedure is unconscionable and that it results in high costs * * *."

In like manner, Senator Ball rejected as unacceptable the administration's proposal on secondary boycotts, stating (93 *Cong. Rec.* 5143; *Legisl. Hist. 1947*, vol. 2, p. 1491):

"* * * That would not touch at all one of the worst situations which has arisen, such as in New York where a local of the IBEW is using the secondary boycott to maintain a tight little monopoly for its own employees, its own members, and a few employers in that area. * * *"

If anything is required to support the conclusion that Congress intended conduct like that here to be banned by Section 8(b)(4)(A), now Section 8(b)(4)(B)—as the statute clearly states—this showing should suffice. As the Carpenters are attempting here, the IBEW Local 3 in *Allen Bradley* was seeking within its local jurisdiction to retain the work available in that limited area for its members by refusing, as here, to install materials fabricated outside its jurisdiction, even though the fabricator's employees might be members of a sister local of the IBEW. In that case, as here, there was no direct dispute with any of the outside manufacturers. The purpose of Local 3, as of the Carpenters here, was to retain or obtain work for its members. To accomplish this, Local 3, as the Carpenters here, required the employers to refrain from

using or handling the products of outsiders. The only condition under which the outside product would be handled was by reassembly by Local 3 members—here by Carpenters' members. This Congress plainly declared was to be prohibited by Section 8(b)(4)(A).

Further confirmation, if any be needed, that Congress intended the plain language of Section 8(b)(4)(A)—banning proscribed conduct to require "*any* employer" to cease "using" the products of "*any* other * * * manufacturer"—to apply to the kind of product boycott here, and did not intend to carve out an exemption for boycotts to preserve work, is found in the majority's refusal to accede to the efforts of the section's opponents to secure a relaxing of the secondary boycott ban proposed, and subsequently enacted, to bring it more in line with the limited recommendation of the President. Thus, Senators Thomas, Murray and Pepper, in a minority dissenting report to the Committee's majority report criticized the majority's "assumption that all secondary boycotts are unjustified" and the failure to heed the President's admonition (S. Minority Rept. No. 105, pt. 2, on S. 1126, p. 20; *Legisl. Hist. 1947*, vol. 1, p. 482) that:

> "Not all secondary boycotts are unjustified. We must judge them on the basis of their objectives. For example, boycotts intended to protect wage rates and working conditions should be distinguished from those in furtherance of jurisdiction disputes. * * * There should be no blanket prohibition against boycotts. The appropriate goal is legislation which prohibits secondary boycotts in pursuance of unjustifiable objectives, but does not impair the union's right to preserve its own existence and the gains made in genuine collective bargaining."

The minority report continued by reciting (*ibid.*) that —

> "* * * This bill ignores valid distinctions between justified and unjustified boycotts based on the objective of the union in carrying on such a boycott and the relationship of the boycotted employer to the disputing employer. It indiscriminately bans all such boycotts, whether justified or not."

Subsequently, in the debates on the floor, Senators Thomas (93 *Cong. Rec.* 4897-4898; *Legisl. Hist. 1947*, vol. 2, p. 1341), Murray (93 *Cong. Rec.* 4148, 4156, 5107; *Legisl. Hist. 1947*, vol. 2, pp. 1034, 1048, 1455), Pepper (93 *Cong. Rec.* 4321-4324, 4497-4499; *Legisl. Hist. 1947*, vol. 2, pp. 1104-1109, 1179-1180), and Barkley (93 *Cong. Rec.* 5292-5293; *Legisl. Hist. 1947*, vol. 2, p. 1511), reiterated these views. Senator Thomas, *inter alia*, emphasized that it was essential that unions be permitted to engage in secondary boycotts for the preservation of "terms and conditions of employment, and the maintenance of hard-won working standards" (93 *Cong Rec.* 4897-4898; *Legisl. Hist. 1947*, vol. 2, p. 1341). Senator Murray accented a union's need for the secondary boycott "to preserve its own existence and the gains made in genuine collective bargaining" (93 *Cong. Rec.* 5107; *Legisl. Hist. 1947*, vol. 2, p. 1455). Senator Pepper protested the Committee's bill which "outlaws all kinds of so-called secondary boycotts, even when the objective of the boycott is to preserve wage and working condition gains already achieved by collective bargaining" (93 *Cong. Rec.* 4324; *Legisl. Hist. 1947*, vol. 2, p. 1108).

Senator Taft, as did Senator Ball, directly answered these criticisms (93 *Cong. Rec.* 4323, 5144; *Legisl. Hist. 1947*, vol. 2, pp. 1106, 1491). Senator Taft answered

Senator Pepper by making his often quoted statement (93 *Cong. Rec.* 4323; *Legisl. Hist. 1947*, vol. 2, p. 1106) that—

> "* * * Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice."

After the conference of the houses, the then Representative Javits criticized the House conferees' acceptance of the sweeping language of the Senate's Section 8(b)(4)(A), although endorsing its prohibition of a "labor union's effort to keep certain goods out of a market because the labor union fears the effect of new inventions or new methods"—the exact union conduct involved here. Senator Javits' criticism was (93 *Cong. Rec.* 6449; *Legisl. Hist. 1947*, vol. 1, p. 876) that—

> "Under the extremely wide definition of boycotts in the bill, unions cannot protect themselves against strikebreaking within the same industry. The bill provides that workers may not refuse to handle or work on any goods for the purpose of forcing their employer to cease handling the goods of another producer; yet that other producer may be in the same line of business, his employees may be out on strike and he may be using the first estab-

lishment to work on his goods as a means of strike-breaking. This provision is not only bad, but summary power is vested in any regional attorney of the NLRB to get an immediate court injunction to restrain any such legitimate refusal to handle 'hot goods,' and the protection of the Norris-La-Guardia Anti-Injunction Act, for which labor fought for 50 years, is removed in such a case. *This is not the kind of boycott which is contrary to the public interest, that other kind results from a misguided labor union's efforts to keep certain goods out of a market because the labor union fears the effect of new inventions or new methods. But while dealing with this legitimate abuse,* the bill also has the effect of depriving labor of a right of self preservation which has never been questioned before." (emphasis added)

Representative Madden at the same time voiced a more sweeping criticism of the House Conferees' acceptance of the Senate's Section 8(b)(4)(A) provision, criticizing it because it was not limited as recommended by the President and because it restricted unions in their right to engage in boycott activities to protect "their own organizations and their wage-and-hour standards against the destructive competition" (93 *Cong. Rec.* 6542; *Legisl. Hist. 1947,* vol. 1, p. 887).

Notwithstanding this vocal opposition to Section 8(b)(4)(A), often expressed in terms critical of the prohibition of the boycott utilized to preserve working conditions and standards—which obviously included boycotts of prefabricated products to preserve work—both Houses of Congress overwhelmingly enacted the 1947 amendments, including Section 8(b)(4)(A) (93 *Cong. Rec.* 6549, 6695; *Legisl. Hist. 1947,* vol. 1, pp. 889-900, vol. 2, pp. 1620-1621).

Moreover, and notwithstanding the renewed criticism of Section 8(b)(4)(A) in the President's veto message (93 *Cong. Rec.* 7500, 7501; *Legisl. Hist. 1947,* vol. 1, p. 918) that the section—

> "* * * would deprive workers of the power to meet the competition of goods produced under sweatshop conditions by permitting employers to halt every type of secondary boycott, not merely those for unjustifiable purposes."

both Houses endorsed the section's sweep by overwhelmingly overriding the veto (93 *Cong. Rec.* 7504, 7692; *Legisl. Hist. 1947,* vol. 1, p. 922, vol. 2, pp. 1656-1657).

Plainly, as the Board held in the *Wadsworth* case in 1949 (*supra,* pp. 38-39), Congress in Section 8(b)(4)(A) intended to and did "deal a death blow" to the "product boycott", "whether for economic or for other objectives". The present Board's attempt now to write into the section an exemption for product boycotts "for economic * * * objectives"—preservation of work—has no justifiable foundation whatsoever.

2. The Landrum-Griffin 1959 amendments

The Taft-Hartley amendments, while clearly prohibiting work stoppages and other inducements to effectuate product boycotts, nonetheless did not reach all of the attendant abuses. This Court in its 1958 *Sand Door* decision held that although union efforts to obtain or enforce agreements whereby an employer promised not to handle goods of other employers were violative of the Act, the agreements themselves were not unlawful. This loophole (among others) was closed in 1959, when the Landrum-Griffin Act was passed.

S. 1555, which when enacted contained the Landrum-Griffin amendments, as introduced and reported to the Senate by Senator Kennedy contained no prohibition against agreements not to handle products of or not to do business with another person (see S. Rept. No. 187, 86th Cong., 1st Sess., pp. 54-65; *Legisl. Hist. 1959,* vol. I, pp. 391-396, 450-461, vol. II, pp. 1015-1019). Committee members Goldwater and Dirksen criticized the failure of S. 1555, as reported, to ban Teamsters' "hot-cargo clauses" and to close other "loopholes" in the secondary boycott provisions of the Act (S. Rept. No. 187, 86th Cong., 1st Sess., Minority Views, pp. 78-80; *Legisl. Hist. 1959,* vol. I, pp. 474-476). As passed by the Senate on April 25, 1959 (*Legisl. Hist. 1959,* vol. I, p. 582, vol. II, p. 1257), S. 1555 contained the Gore amendment, adopted on the Senate floor, which prohibited unions and common carriers subject to the provisions of the Interstate Commerce Act from entering into agreements not to handle the products of or to do business with any other employer, (*Legisl. Hist. 1959,* vol. II, pp. 1161, 1163).

Subsequently in the House, Representative Elliott introduced H.R. 8342 (*Legisl. Hist. 1959,* vol. II, p. 1517) which, as reported out by the House Labor Committee, contained a ban against agreements between unions and common carriers similar to that contained in S. 1555, with certain provisos (H. Rept. No. 741 on H.R. 8342, 86th Cong., 1st Sess., pp. 20-22, 51, 80; *Legisl. Hist. 1959,* vol. I, pp. 755-756, 778-780, 809, 838). Meanwhile, Representatives Landrum and Griffin had introduced their identical bills, H.R. 8400 and H.R. 8401 (*Legisl. Hist. 1959,* vol. I, pp. 619-686, vol. II, p. 1527). These bills contained Section 8(e) as ultimately enacted, except for the provisos (*Legisl. Hist.*

1959, vol. I, p. 683).[34] In a separate statement in the report accompanying H.R. 8342, Committee members Landrum and Griffin stated their intention to seek House adoption of their bill, H.R. 8400-H.R. 8401, in substitution for H.R. 8342 (H. Rept. No. 741 on H.R. 8342, 86th Cong., 1st Sess., pp. 99-100; *Legisl. Hist. 1959*, vol. I, pp. 857-858). On August 12, 1959, Representative Landrum proposed substituting the text of H.R. 8400 for the text of H.R. 8342 (*Legisl. Hist. 1959*, vol. II, pp. 1645-1646). On August 13, 1959, the House approved the proposed substitution (*Legisl. Hist. 1959*, vol. II, pp. 1691-1692) and, on August 14, 1959, H.R. 8342, as amended by the Landrum-Griffin bill, was passed (*Legisl. Hist. 1959*, vol. II, pp. 1701-1702). On the same day the House substituted the text of H.R. 8342, as thus amended, for the text of S. 1555 and requested a conference with the Senate (*Legisl. Hist. 1959*, vol. II, p. 1702).

The sweep of Section 8(e) in H.R. 8400 was thoroughly discussed in the House between the time of its introduction and the substitution of its provisions for those of H.R. 8342 and S. 1555. Thus, Representative Howard Smith criticized H.R. 8342 as weakening "the law as to boycott and hot cargo by completely exempting the very worst offenders" and extolled Section 8(e) in H.R. 8400 as containing "no ifs, ands, buts * * *. It says you have to stop the boycott, hot cargo practices period. It and that is what the American people want you to say" (*Legisl.*

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[34] The only other exception is that, in the clause "and any collective bargaining contract entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void", the words "collective bargaining contract" were changed to "contract or agreement" before enactment.

Hist. 1959, vol. II, p. 1549). Both Representative Landrum and Representative Griffin referred to the case of *Burt Mfg. Co.*, 127 NLRB 1629, as involving one kind of unjustifiable conduct which should be stopped. In that case, the Sheet Metal Workers Union, claiming that its purpose was "one of preserving work opportunities for the sheet metal contractors' employees whom they represented" (*ibid.*, at p. 1632), utilized clauses in agreements with such contractors, giving it exclusive jurisdiction over fabrication with metal of No. 10 U.S. gauge or less, to keep the products of Burt Manufacturing Co., whose employees were represented by the Steelworkers, from being installed (*ibid.*, at pp. 1639, 1665-1666). In connection with his reference to the *Burt Mfg. Co.* case, Representative Griffin criticized the limited scope of H.R. 8342 and stated that H.R. 8400 "would ban all hot cargo agreements", as follows (*Legisl. Hist. 1959*, vol. II, p. 1568):

> "Fifth. The union official can also avoid the effect of the act if somehow, through economic coercion or otherwise, he can get B to sign a hot cargo agreement—under which B will agree not to deal with A. Of course, this is standard procedure for the Teamsters Union. This is the one loophole that the committee bill recognizes. However, the committee bill only nips at the heel of the problem by outlawing those hot cargo agreements which are made with common motor carriers subject to part II of the Interstate Commerce Act.
>
> "Our substitute would ban all hot cargo agreements."

Representatives Thompson and Udall criticized Section 8(e) in H.R. 8342 because it "would invalidate the subcontracting clauses which have proven essential to stabilizing the garment industry" and "cast doubt

upon the ability of unions to bargain in other industries" for contracts "to protect the employees against the loss of jobs" (*Legisl. Hist. 1959*, vol. II, p. 1576). Representative Roosevelt, another critic of H.R. 8400, stated that Section 8(e) made "all hot cargo contracts with any employer an unfair labor practice, thus greatly encouraging the nonunion made product and products produced under sweatshop conditions" (*Legisl. Hist. 1959*, vol. II, p. 1703), stating that it would even ban agreements not to purchase "non-union-made automobile parts" or "not to buy non-union-made uniforms for their drivers or not to use non-union-made material in the construction or repair of their terminals" (*ibid.*, vol. II, p. 1593).

Representative Rhodes, a proponent of H.R. 8400, the Landrum-Griffin bill, characterized its Section 8(e) as "a much needed reform" which, among other things, would make unlawful agreements "various building and printing trade unions have insisted on" "under which employees are excused from handling certain prefabricated products", or "products which do not bear the label of a particular union, or products manufactured by a company dealing with some other union" (*Legisl. Hist. 1959*, vol. II, p. 1581).

Upon this extensive background of thorough discussion and consideration of the sweep of H.R. 8400's Section 8(e), the House substituted the text of H.R. 8400 for H.R. 8342 and S. 1555 and sent the matter to conference.

After this there was further discussion of the breadth of its Section 8(e) in both the Senate and the House. Senator Kennedy and Representative Thompson submitted a joint analysis of the "secondary boycott and hot cargo provisions" of the Landrum-Griffin bill

(*Legisl. Hist. 1959*, vol. II, p. 1706). In it these legislators, *inter alia*, objected "to extending the 'hot cargo' limitation into a general prohibition such as the House bill contains" because it "would also outlaw legitimate forms of collective agreement" (*ibid.*, p. 1708). Particularly, they were critical of the fact that the bill, in Section 8(e), would ban the "Limitations on contracting out work in the garment industry" which had become a common practice to control "sweatshop" operations, stating that Section 8(e) "outlaws these clauses. There is no other way in which the language can be interpreted, for it unequivocally outlaws any contract between an employer and a union 'whereby such employer * * * agrees to refrain from * * * doing business with any other person'" (*ibid.*). They also asserted concern over the fact that "subcontracting" clauses in other industries agreed to "in order to protect the employees against the loss of jobs"—illustrating with the examples of a textile concern agreeing "not to contract out the mending of cloth while any of its own members were unemployed" and of a power company agreeing "not to contract out any of its line construction while its own regular employees worked less than 40 hours a week"—although having "nothing to do with hot cargo agreements or secondary boycotts", "appear to be outlawed by the House bill" (*ibid.*) They recommended that the "bill should be revised to avoid this interference with normal collective bargaining" (*ibid.*). However, Senator Kennedy and Representative Thompson did not even suggest that the bill should be revised to permit product boycotts of the type here involved.

After initial conferences with the House representatives, Senator Kennedy returned to the Senate for in-

structions as to positions to be taken with the House conferees on S. 1555, as amended by substitution of the text of H.R. 8400 (*Legisl. Hist. 1959*, vol. II, pp. 1382-1383). Although Senator Kennedy proposed instructions, which never issued, to have required his Senate conferees to insist upon a proviso to Section 8(e) which would have exempted from the prohibitions of Sections 8(e) and 8(b)(4)(B) (i) joint venturers and persons in the relationship of contractor and subcontractor, (ii) employers performing struck work, and (iii) employers engaged in an integrated process of production (*ibid.*), Senator Kennedy never sought instructions from the Senate to insist upon a similar exemption for product boycotts such as here.

In further conference, the House conferees agreed to the two provisos exempting the apparel and clothing industry from the prohibitions of Sections 8(e) and 8(b)(4)(B) (*supra*, p. 41) but refused to extend the exemption to any "other industry regardless of whether similar integrated processes of production may exist between jobbers, manufacturers, contractors, and subcontractors" (H. Rept. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 40; *Legisl. Hist. 1959*, vol. I, p. 944). They further agreed to the limited exemption from the provisions of Section 8(e) for agreements in the construction industry relating to work "to be done at the site" (*supra*, p. 41; H. Rept. No. 1147, p. 39; *Legisl. Hist. 1959*, p. 943). With these limited exemptions to Section 8(e), and the changes agreed upon in respect to other parts of the House bill, the conferees reported back to the Senate and House an agreement on S. 1555, as amended in the House (H. Rept. No. 1147 on S. 1555; *Legisl. Hist. 1959*, vol. I, pp. 934-946).

Nonetheless, Senator Morse continued before the Senate to oppose adoption of the House's amendments as modified in conference. Referring to Section 8(e), Senator Morse explained that "the House bill, and now the conference report, have made it an unfair labor practice for any employer and a union to include in their agreement, a provision which imposes *any condition* upon doing business with another employer", specifically pointing out that it "would prevent a union from protecting the bargaining unit it represents by obtaining an agreement *not to subcontract work normally performed by employees in the unit*" (*Legisl. Hist. 1959,* vol. II, p. 1428; emphasis added). Senator Morse also emphasized that the section would ban agreements not to handle certain products (*ibid.*). Despite this opposition, and the previous opposition of some House members, the House bill, including Section 8(e) with the three provisos agreed to in conference (*supra,* p. 56), was overwhelmingly adopted by both Houses (*Legisl. Hist. 1959,* vol. II, pp. 1452-1453, 1738-1739).[35]

It is thus clear that the members of Congress, through the pointed discussions in both houses, were fully aware that Section 8(e), as proposed in the House bill (S. 1555), would prohibit agreements for product boycotts of the nature here and intended such prohibi-

[35] Representative Thompson, who previously had opposed Section 8(e) in the Landrum-Griffin bill, recommended House approval of Section 8(e), which, as he stated, "extended the hot cargo provisions of the Senate bill to *all* agreements between an employer and a labor union by which the employer agrees not to do business with another concern", with the conference exemptions "for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project" (*Legisl. Hist. 1959,* vol. II, p. 1721).

tion, exempting only from the prohibition of the section the types of agreements specified in the three provisos.

Further, and conclusive, evidence that the legislators consciously intended the ban of Section 8(e) to apply to agreements for product boycotts like those here involved is disclosed in the adoption in conference of the first proviso to Section 8(e)—that relating to "work to be done at the site of the construction" (*supra*, p. 41). This exemption to the broad ban of Section 8(e) was stated in the House Conference Report to be limited to "subcontracting of work to be done at the site of the construction" and *"does not exempt from Section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction"* (H. Rept. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 39; *Legisl. Hist. 1959*, vol. I, p. 943; emphasis added). Senator Kennedy confirmed this in his oral report to the Senate that "the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction'. *The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite*, or suppliers who do not work at the jobsite" (*Legisl. Hist. 1959*, vol. II, p. 1433; emphasis added). The unanimous agreement in Congress that the exemption for the construction industry was limited to work "to be done" at the construction site and did not apply to "boycotts of goods manufactured in an industrial plant for installation at the jobsite", forecloses any contention that Congress, *sub silentio*, intended to carve out a further exemption to Section 8(e) for a product boycott in the construction industry in aid of

a claim of "work preservation", as here advanced by the Board. To the contrary, Congress deliberately refused to grant such an exemption.[36]

In view of the extensive discussion in Congress of the sweeping scope of Section 8(e) as proposed in the Landrum-Griffin amendments, and the concentrated efforts of its opponents to limit its scope (shown above), it is futile for the Board to suggest, as it seems to, that the purpose of Section 8(e), as enacted, was designed to strike down only the traditional "hot cargo" clause. While the Congressional effort started out as an attempt to curb Mr. Hoffa's power, maintained in part through the Teamsters' "hot cargo" contracts, the complexion of the Congressional endeavors changed completely upon introduction and discussion of the Landrum-Griffin amendments. Thenceforth, "hot cargo agreement" became synonymous with "any" agreement whereby "any" employer agrees with "any" union to cease "handling, using" "any" product of "any" other employer.

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[36] The statements of Senator McNamara and Representative Thompson, inserted in the *Congressional Record* after passage of the 1959 amendments, purporting to set forth their understanding of the construction industry proviso (*Legisl. Hist. 1959*, vol. II, pp. 1815, 1816), have no legislative significance. These statements constitute no more than mere expressions of personal views made after the amendments were adopted. Congress, however, acted with knowledge of the limited purpose of the construction industry proviso as currently reported in the Conference Report (H. Rept. No. 1147, *supra*) and by Senator Kennedy. Moreover, these statements are nullified by the contradictory post-legislation statement of Representative Kearns (*Legisl. Hist. 1959*, vol. II, p. 1861).

D. An Employer's Choice of Products or Equipment Is Not a Mandatory Subject for Bargaining

The Board seems to view an employer's selection of products to be used as indistinguishable from a routine subcontracting of work, to which a mandatory duty to bargain applies, citing *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203. From this premise, presumably the Board would argue that if the employer's choice of products to use is a mandatory subject of bargaining under the Act it is a matter regarding which the parties may lawfully reach agreement without violating Section 8(e). However, this Court's decision in *Fibreboard* recognizes significant limitations on the types of subcontracting that are subject to the mandatory bargaining provisions of the Act. Moreover, the decision as to the types of materials to use and the source of supply has nothing in common with the decision to subcontract the same work formerly done by one's own employees to another employer to be done by the latter's employees and is plainly outside the scope of any mandatory duty to bargain.

In *Fibreboard* the issue was whether the employer was required to bargain about its decision to subcontract the maintenance work at its plant, currently being done by its own employees, to another employer for performance by the latter's employees. This Court, "on the facts of [that] case" (*ibid.*, p. 209), held that the employer there was required under the Act to bargain about its decision, stating (at p. 213):

> "The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's

> basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business."

This Court made clear, however, that it was not holding that all forms of "contracting out" or "subcontracting" are mandatory subjects of bargaining, stating (at p. 215):

> "We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."

Plainly, this Court's limited decision in *Fibreboard* —that an employer is required under the Act to bargain about subcontracting which involves "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment"—has no application to the instant matter which does not involve subcontracting at all and relates solely to the questioning of materials or products selected by the employer

for handling or using by his employees in the performance of the work for which they were engaged.

Moreover, the selection of the products to be handled, or used, by the employees in the performance of their assigned work tasks, like the decision of what products to produce, is a management prerogative in respect to which there can be no compulsory obligation under the Act to bargain. These are decisions which management must be free to make unilaterally because they concern the commitment of investment capital and the basic scope of the enterprise. They are not in themselves primarily devoted to conditions of employment. This distinction was pointed out in the concurring opinion of Justices Stewart, Douglas and Harlan in the *Fibreboard* case (at p. 223):

> "While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve 'conditions of employment' that they must be negotiated with the employees' bargaining representative.
>
> "In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not 'with respect to * * * conditions of employment.' Yet there are other areas

where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area."

Under these circumstances, it is submitted, the plain language of Sections 8(e) and 8(b)(4)(A) and (B) of the Act, as well as the Congressional intent expressed in the debates which preceded the enactment of the provisions of these sections in 1947 and 1959, cannot be disregarded because of any supposed conflict between them and the bargaining obligations of the Act. There is none.

IV. CONCLUSION

Accordingly, this Court should reverse the Court of Appeals insofar as it affirmed the Board's finding of no violation of Section 8(b)(4)(B) of the Act in respect to the Frouge project, affirm the court of appeals in all other respects, and remand the matter for the entry of proper orders.

Respectfully submitted,

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